

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOFI FEDERAL BANK, a federally chartered  
banking institution,

Plaintiff,

v.

ADVANCE FUNDING LLC; KIRK A.  
TOVEY, individually and as trustee of the  
KIRK A. TOVEY REVOCABLE TRUST; and  
SETTLEMENT COLLECTION SERVICE,  
LLC,

Defendants.

NO. 2:14-cv-00484-BJR

**PLAINTIFF BOFI FEDERAL  
BANK'S SURREPLY IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

1 Pursuant to Local Civil Rule 7(g), Plaintiff BofI Federal Bank (“BofI”) files this  
2 surreply to request that the Court strike portions of Defendants’ Reply in Support of Motion for  
3 Summary Judgment of Dismissal (“Reply,” Dkt. 116).

4 In Defendants’ Motion for Summary Judgment of Dismissal (“Motion,” Dkt. 110),  
5 Defendants Settlement Collection Service, LLC (“SCS”) and Kirk A. Tovey, individually and  
6 as trustee of the Kirk A. Tovey Revocable Trust (“Tovey”), expressly stated that they were  
7 moving for summary judgment on only two elements of BofI’s tortious-interference claim.  
8 They argued that BofI “has not and cannot establish that the Defendants had prior knowledge  
9 of the BOFI Agreement or that they induced Ms. Venzant to cancel the arrangement.” (Motion  
10 10:18-20.) They stated in footnote 1: “Although, for purposes of the Motion, *only two*  
11 *elements of the cause of action are discussed*, Defendants are not waiving and specifically  
12 reserve the right to challenge each and every element of the claim.” (*Id.* at 10:25-26, emphasis  
13 added.) Because SCS and Tovey discussed only two elements of BofI’s tortious-interference  
14 claim, BofI only discussed those two elements of the claim in its Opposition to Defendants’  
15 Motion for Summary Judgment of Dismissal (“Opposition”). (Dkt. 114, at 11:3 – 15:11.)

16 In their Reply, SCS and Tovey for the first time challenge the first element of BofI’s  
17 tortious-interference claim. (Reply 3:7 – 5:15.) They contend that because BofI argued in its  
18 Opposition that Ms. Venzant “was aware of and consented to the two-year postponement for  
19 payment,” BofI “reveal[ed] that apparently it never had an enforceable agreement. (*Id.* at 3:8-  
20 11.) Not only is this argument incorrect (SCS and Tovey cite no authority for the proposition  
21 that amendment of the BofI Agreement [including the Life Contingent Payment Addendum]  
22 was necessary or that the BofI Agreement was unenforceable absent such amendment), BofI  
23 has maintained throughout this litigation that Ms. Venzant knew about and agreed to the two-  
24 year extension. (*See, e.g.*, Dkt. 38 at 5:6-8.) It was therefore improper for SCS and Tovey to  
25 address this issue for the first time in their Reply.

1 BofI accordingly requests that the Court strike Section A of SCS and Tovey's Reply (at  
2 3:7 – 5:15).<sup>1</sup>

3 DATED: October 16, 2018

4 **SAVITT BRUCE & WILLEY LLP**

5  
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25 <sup>1</sup> To the extent SCS and Tovey are suggesting in their Reply that the BofI Agreement was unenforceable  
26 because Ms. Venzant purportedly cancelled it (Reply 6:3-22, 8:2-3, 10:20-26), that argument would also  
27 be improper in a reply brief and the Court should strike it – especially since at most, Ms. Venzant's  
purported cancellation notice would only have constituted an anticipatory breach or repudiation of the  
BofI Agreement. *See CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63, 74 (1991).

**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 16<sup>th</sup> day of October, 2018 at Seattle, Washington.



Rondi A. Greer